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BEFORE THE ARIZONA CORPORATION COMMISSION

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CHAIRMAN

BOB STUMP
COMMISSIONER

BOB BURNS
COMMISSIONER

TOM FORESE
COMMISSIONER

ANDY TOBIN
COMMISSIONER

**IN THE MATTER OF THE
APPLICATION OF ARIZONA PUBLIC
SERVICE COMPANY FOR A
HEARING TO DETERMINE THE FAIR
VALUE OF THE UTILITY PROPERTY
OF THE COMPANY FOR
RATEMAKING PURPOSES, TO FIX A
JUST AND REASONABLE RATE OF
RETURN THEREON, TO APPROVE
RATE SCHEDULES DESIGNED TO
DEVELOP SUCH RETURN.**

DOCKET NO. E-01345A-16-0036

DOCKET NO. E-01345A-16-0123

Arizona Corporation Commission

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**IN THE MATTER OF FUEL AND
PURCHASED POWER
PROCUREMENT AUDITS FOR
ARIZONA PUBLIC SERVICE
COMPANY.**

**ENERGY FREEDOM COALITION
OF AMERICA'S RESPONSE TO THE
MOTION TO COMPEL FILED BY
ARIZONA PUBLIC SERVICE**

Arizona Public Service (the "Company") claims that Energy Freedom Coalition of America ("EFCA") has improperly failed to respond to various data requests. Of those, APS fails to mention that EFCA actually answered Data Requests 1.1, 1.2, 1.3, 1.4(b), and 1.5. EFCA objected to the remainder in thoroughly explained and valid objections supported by Arizona law. Moreover, the Company failed to clarify the disputed discovery requests in the personal consultation about EFCA's responses. The Company's Motion to Compel should be denied.

1 **I. RESPONSES TO MOST OF THE IDENTIFIED DATA REQUESTS WERE PROVIDED.**

2 Four of the Data Requests that the Company spends half of its Motion discussing have been
3 answered.

4 **A. DATA REQUEST 1.1(A) – EFCA’S BUSINESS, PURPOSE, FUNDING, ETC.**

5 EFCA stated on November 18, 2016: “Without waiving any objections and as set forth in
6 its Application to Intervene filed in this docket, EFCA advocates for the proliferation of distributed
7 energy resources (“DERs”) around the country.”¹ Portions of the November 18, 2016 Responses
8 are attached hereto as Exhibit A.

9 EFCA later supplemented this Response to indicate it obtains all of its funding from its
10 Members.² Yet the Company still argues EFCA failed to provide a response to the data request
11 inquiring about EFCA’s “source of funding,”³ while acknowledging that EFCA provided a
12 Supplemental Response on November 29, 2016. The Company notes that the Supplemental
13 Response contained a single addition,⁴ but fails to mention that the addition disclosed the source
14 of funding for EFCA and that EFCA agreed to disclose the source of funding in the meet-and-
15 confer.

16 The Company dedicates extensive time and effort disputing EFCA’s objections,⁵ but fails
17 to advise the Judge that EFCA provided answers to this request.

18 **B. DATA REQUEST 1.1(B) – EFCA’S MEMBERS, BOARD OF DIRECTORS, ETC.**

19 In the November 18, 2016 response to Data Request 1.1(b), EFCA stated that “EFCA is a
20 limited liability company formed in Delaware with the following Members as previously set forth
21 in its Application to Intervene: Zep Solar LLC; Ecological Energy Systems; 1 Sun Solar Electric
22
23

24 ¹ Response to APS 1.1(a), page 1 of the November 18, 2016 Responses. The Company’s counsel did indicate in the
personal consultation that the list of Members was missing and he was directed to the Response where the
information was clearly provided. He failed to raise the issue again.

25 ² November 29, 2016 Supplemental Responses, page 1. The funding inquiry was a topic during the personal
consultation and as a result of that conference, EFCA supplemented its responses. The Company has not requested
26 or held a subsequent personal consultation addressing any displeasure with the response provided.

27 ³ Motion to Compel, page 6 lines 8-14, 21-28, page 7 lines 1-21.

28 ⁴ Motion to Compel, page 4 lines 5 & 6.

⁵ EFCA included objections, and answered despite those objections, as prophylactic measure in the event further
discovery on a similar issue was propounded or the Company argued the question was not fully answered.

1 LLC; Go Solar LLC; Silveo LLC; and Solar City Corporation.”⁶ So the Company’s claim that
2 EFCA refused to identify its Members (page 8 of its Motion, line 3) is simply false. Also, on
3 November 18, 2016, EFCA stated “Without waiving any objections, EFCA is not a corporation
4 and has no board of directors.”⁷ Publicly available information (*e.g.*, filings with the Arizona
5 Corporation Commission) indicates EFCA is a member-managed limited liability company and
6 thus its members are its decision-makers. A.R.S. §29-654(A).

7 **C. DATA REQUEST 1.2 – SALE OF PRODUCTS OR SERVICES**

8 In response to Data Request 1.2(a) and 1.2(b) EFCA stated on November 18, 2016: “...
9 EFCA advocates for the proliferation of DERs which could be viewed as a service.”⁸ To be clear,
10 EFCA does not sell any products; it is an organization that advocates. The Company falsely claims
11 that EFCA refused to answer this Request when, in fact, EFCA provided a response. If the
12 Company is interested in “how” and “why” EFCA is interested in this proceeding, as stated in its
13 Motion to Compel,⁹ it should have asked those questions rather than the one it asked (which was
14 answered). A motion to compel is not the proper vehicle to obtain responses to questions not
15 previously asked.

16 **D. DATA REQUEST 1.4(B) – OWNERSHIP OF EFCA**

17 In response to Data Request 1.4(b), EFCA responded on November 18, 2016 that “The
18 rights of EFCA’s members do not translate into percentages...”¹⁰ EFCA previously advised the
19 Company in the same November 18, 2016 Responses who its members are and that EFCA is a
20 limited liability company. The Company’s Motion with regard to the answered data requests
21 should be denied.

22 //

23
24
25 ⁶ November 18, 2016 Responses, page 2. Incidentally this information was also provided in EFCA’s Motion to
Intervene and is publicly available at <http://ecorp.azcc.gov/Details/Corp?corpId=R20863768>

26 ⁷ November 18, 2016 Responses, page 2, first paragraph. The same publicly available information cited in footnote
2 indicates that EFCA is Member managed.

27 ⁸ November 18, 2016 Response, page 3. This topic was also raised during the personal consultation with counsel for
the Company, and again, the Company’s counsel had failed to see that an answer was provided and he was directed
back to the Response where he could find the answer.

28 ⁹ Motion to Compel, page 8 lines 22-25.

¹⁰ November 18, 2016 Responses, page 6.

1 **II. EFCA ASSERTED VALID OBJECTIONS TO THE OTHER DATA REQUESTS IDENTIFIED BY**
2 **APS.**

3 EFCA objected to four other Data Requests that the Company includes in its Motion.
4 During the personal consultation between the Company and EFCA, the Company failed to raise
5 many of the issues raised in its Motion and failed to modify the requests as it has done in this
6 Motion. Had it done so, most of this Motion would be unnecessary.

7 **A. DATA REQUEST 1.3 – SERVICES MEMBERS PROVIDE TO EFCA**

8 In response to Data Request 1.3, EFCA interposed objections to the extent the request
9 called for confidential or privileged information, specifically the Company's request for a
10 description "with particularity" of services provided by any member of EFCA to or for EFCA.
11 During the personal consultation, EFCA asked the Company's attorney for the case law that
12 supported his position that there was no privilege between EFCA and those providing legal or
13 accounting services to EFCA and EFCA. (Note that Data Request 1.3(b) asks that EFCA "describe
14 with particularity the service being provided ..."). The Company could not cite any authority to
15 support its argument. The Company was asked to supply it later and never did. Rather than provide
16 that case law or hold a second personal consultation, the Company filed this Motion. In contrast,
17 EFCA has found on-point authority supporting the basis of EFCA's objection.¹¹

18 In the Motion to Compel, for the first time, the Company offers to permit EFCA to describe
19 generally (rather than "with particularity") the services provided, and offers again, for the first
20 time, to exclude from production the identity of any consulting expert. Had the Company offered
21 these concessions in the personal consultation, EFCA would have responded "No, its Members

22
23 ¹¹ Work product protection extends to any materials prepared in anticipation of litigation by or for a party. *Corbin v.*
24 *Weaver*, 140 Ariz. 123, 129, 680 P.2d 833 (App. 1984); *Kaliber v. Orzel*, 148 Ariz. 320, 323, 714 P.2d 813 (1986)
25 (trial preparation materials include three categories of things including statements documents and things prepared
26 in anticipation of litigation without the requirement that they be prepared by an attorney or at her direction. *See also,*
27 *In re Cendant Corp. Sec. Lit.*, 343 F.3d 658, 662-63 (3d Cir. 2003) (work product protection "extends beyond
28 materials prepared by an attorney to include materials prepared by an attorney's agents and consultants"); *United*
States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980) (noting that work product protection encompasses nonparty work
product); *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 76 (D.D.C. 2003). Indeed, by its own terms, Rule 26(b)(3)
protects materials prepared "by or for another party or by or for that other party's representative (including the other
party's attorney, consultant, surety, indemnitor, insurer, or agent)...." Ariz R.Civ.P. 26(b)(3); *see also Hertzberg*,
273 F. Supp. 2d at 76 ("By its own terms, then, the work-product privilege covers materials prepared by or for *any*
party or by or for its representative; they need not be prepared by an attorney or even for an attorney.") (emphasis
in original) (internal citations omitted).

1 have not provided legal, accounting, tax, physical resources or consulting to EFCA.” For these
2 reasons, this portion of the Motion should be denied.

3 **B. DATA REQUEST 1.4(A) – EXECUTIVES OF EFCA**

4 EFCA inadvertently omitted its response to this inquiry and that error would have been
5 identified and rectified had the Company identified this request during the personal consultation.
6 EFCA now responds: EFCA has no senior level executives and is managed by its members.

7 **C. DATA REQUEST 1.5 (A)-(C) – EMPLOYEES OF EFCA**

8 EFCA objected to the request for information about its employees because the information
9 is not reasonably calculated to lead to the discovery of admissible evidence and serves no
10 legitimate purpose. In the personal consultation, the Company offered no reason for seeking this
11 information other than to accuse EFCA of “bias” in this action, but offered no explanation as to
12 how the number of employees or their compensation would demonstrate bias.

13 Most troubling is 1.5(c), which asks how EFCA members allocate costs to pay for EFCA
14 employees. If this alleged “bias” is meant to characterize EFCA’s legitimate advocacy for
15 distributed generation in Arizona and across the country, EFCA submits that leveraging the tools
16 of discovery to force disclosure of the identities and compensation of its Members’ employees
17 raises significant constitutional concerns. *See NAACP v. Alabama*, 357 U.S. 449, 460, (1958)
18 (“Effective advocacy of both public and private points of view, particularly controversial ones, is
19 undeniably enhanced by group association.”); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th
20 Cir. 2010) (“Compelled disclosures concerning protected First Amendment political associations
21 have a profound chilling effect on the exercise of political rights.”) (citing *Gibson v. Florida*
22 *Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963)); *In re Motor Fuel Temperature Sales*
23 *Practices Litigation*, 707 F. Supp. 2d 1145, 1152 (D. Kansas 2010) (“[T]he Supreme Court has
24 recognized that in the context of discovery, the First Amendment creates a qualified privilege
25 against disclosure of certain associational information.”) (citing *NAACP*, 357 U.S. at 462 (1958)).
26 The First Amendment protects “not only the organization itself, but also [] its staff, members,
27 contributors, and others who affiliate with it.” *Int’l Union v. Nat’l Right to Work Legal Defense*
28 *and Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978). “Membership lists are not the only

1 information afforded First Amendment protection.” *Wyoming v. US Department of Agriculture*,
2 208 F.R.D. 449 (2002).

3 Constitutional concerns aside, the Company’s request seeks information irrelevant to this
4 proceeding. Indeed, the Company presents no new arguments in its Motion to Compel as to why
5 the number of employees and how they are paid is relevant to the key issues in this rate case:
6 setting just and reasonable rates, valuing the Company’s property, and setting reasonable rate of
7 return. In fact, the Company’s argument in the Motion on this topic merely asserts that the
8 information is related to EFCA’s interest and involvement in the proceeding; the Company makes
9 no attempt to explain how the number of employees and how they are compensated has anything
10 to do with setting just and reasonable rates or with EFCA’s interest in advocating for DER. The
11 Company argues it is entitled to know who EFCA is (and that information has been provided) but
12 fails to explain how the number of employees or their manner of compensation reveals answers
13 the question of “who EFCA is”.

14 There is no justification for the information requested and this Request should be denied.

15 **D. DATA REQUEST 1.6 – COMMUNICATIONS AND DOCUMENTS BETWEEN EFCA AND**
16 **SOLARCITY REGARDING THIS CASE.**

17 In its motion, the Company claims that EFCA incorrectly asserted that labels of
18 “confidential” or “work product” make the information irrelevant.¹² Actually, EFCA asserted work
19 product, confidentiality, AND relevance objections. To be clear, the information that the Company
20 seeks is confidential, work product, and is protected by First Amendment Freedom of Speech
21 protections.

22 This data request, as written, is limited to communication “regarding the Company’s rate
23 case.” A member-managed limited liability company, by its very nature, can only act through its
24 member or agents. A.R.S. §29-654(A). The members acting for the company are agents of the
25 company. SolarCity is one of those members. The members of EFCA (including SolarCity) are
26 agents and representatives of EFCA and thus the Company’s request seeks communications
27 between agents of EFCA and the principal (EFCA).

28

¹² Motion to Compel, page 11, lines 17-19.

1 Further, the definition of work-product (which was only partially cited by the Company in
2 its Motion) is communications prepared “in anticipation of litigation or for trial **by or for** another
3 party or **by or for that other party’s representative (including the other party’s attorney,**
4 **consultant, ... or agent)**”¹³ [Emphasis added]. To the extent the members of EFCA
5 communicate with each other and with EFCA agents **about the APS rate case**, these
6 communications fall within the plain definition of the work-product doctrine. Tellingly, the
7 Company cites no authority supporting its position that a member in a member-managed
8 organization cannot be an agent or representative of that organization for purposes of protecting
9 confidential information.

10 EFCA correctly asserted a work-product objection to the production of the requested
11 records. During the personal consultation, the Company argued the work product rule does not
12 apply to anyone outside the client organization, but the Company was unable to cite to any case
13 law to support this radical concept then or since.

14 Further, communications between agents of EFCA and EFCA itself are protected free
15 speech under the First Amendment. Protected expression includes political, economic, cultural,
16 and social expression as well as collective effort on behalf of shared goals. See, e.g., *NAACP v.*
17 *Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982); *Larson v.*
18 *Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L.Ed.2d 33 (1982). Preserving protected expression
19 requires that dissident expression be shielded from suppression by the majority. See, e.g., *Gilmore*
20 *v. City of Montgomery*, 417 U.S., at 575, 94 S. Ct., at 2427; *Griswold v. Connecticut*, 381 U.S., at
21 482–485, 85 S. Ct., at 1680–1682; *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405
22 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2. L.Ed.2d 1488
23 (1958). This Data Request invades EFCA’s protected First Amendment right to political
24 association and political expression. “The First Amendment protects political association as well
25 as political expression,” *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976). The
26 “freedom to associate with others for the common advancement of political beliefs and ideas is ...
27 protected by the First and Fourteenth Amendments.” *Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct.

28 ¹³ Ariz.R.Civ.Proc. 26(b)(3). Interestingly this rule was cited by the Company but it failed to completely cite the text
of the rule or to point out that the rule itself is contrary to the Company’s position.

1 303, 38 L.Ed.2d 260 (1973). Compelled disclosure of political expression can have a chilling
2 effect, “[w]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on
3 privacy of association and belief guaranteed by the First Amendment.”); *AFL-CIO v. FEC*, 333
4 F.3d 168, 175 (D.C.Cir.2003).

5 Alternatively, if this Judge does not find that communications between an agent and
6 principal about pending litigation is protected work-product or protected First Amendment speech,
7 this Judge can find that the communications are protected under the common-interest doctrine.
8 Arizona courts recognizes the common-interest doctrine, which permits parties who share a
9 common legal interest to exchange privileged information in a confidential manner for the purpose
10 of obtaining legal advice without waiving attorney-client or work-product privileges. See, e.g.,
11 *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz.130, 75 P.3d 1088, 1099-1101 (App. 2003)
12 (applying common interest doctrine to protect communications shared between counsel to plaintiff
13 in a civil action and non-party). Moreover, courts have held that litigation need not be threatened
14 or anticipated for the common interest doctrine to apply; the parties need only “undertake a joint
15 effort with respect to a common legal interest.” *United States v. BDO Seidman, LLC*, 492 F.3d
16 806, 815-816 (7th Cir. 2007) (affirming the district court’s finding that the common interest
17 doctrine applied when two companies “acting as joint venturers, shared a common interest ‘in
18 ensuring compliance with the new regulation issued by the IRS,’ and in making sure that they
19 could defend their product against potential IRS enforcement actions”); see also *SCM Corp. v.*
20 *Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976) (“The privilege need not be limited to legal
21 consultations between corporations in litigation situations....”).

22 The argument in the Company’s Motion demonstrates a fundamental misunderstanding of
23 the rules regarding production of privileged information. There is no rule under the Commission
24 rules or the Arizona Civil rules that requires a privilege log. Ariz.R.Civ.Proc 26.1(f) only requires
25 that the party withholding material on a claim of privilege describe the nature of the material not
26 produced in a manner sufficient to enable the other party to contest the claim. EFCA did that in its
27 November 18, 2016 Responses and the Company never raised any objection to the description or
28 sought more information during the personal consultation. It is disingenuous and contrary to the

1 purpose of the rules underlying the personal consultation requirement to seek information in a
2 Motion to Compel never previously raised.

3 Finally, the Company has confused the rules regarding resisting discovery with the rules
4 regarding production of work-product information. As previously stated by EFCA, a party
5 resisting ordinary discovery has the burden to establish that it should be excused from participating
6 in discovery; however, there is a special exception under Ariz.R.Civ.Proc 26(b)(3) for material
7 which falls within the purview of the work-product doctrine, to wit: "... a party may obtain
8 discovery of documents and tangible things ... prepared in anticipation of litigation or for trial ...
9 only upon a showing that the party seeking discovery has substantial need of the material in the
10 preparation of the party's case and that the party is unable without undue hardship to obtain the
11 substantial equivalent of the materials by other means..."¹⁴ The Company has not demonstrated a
12 substantial need and undue hardship in obtaining the substantial equivalent by other means.

13 The Company's request for communications between EFCA and one of its members
14 regarding this case should be denied.

15 **E. DATA REQUEST 1.7 – STUDIES OR ANALYSIS PREPARED BY OR FOR EFCA**

16 As stated in its November 18, 2016 Response, EFCA does not possess any non-confidential
17 documents responsive to this request. If it had such documents, they would have been produced,
18 and to the extent they are developed in the future they will be produced. The Response also stated
19 that to the extent the Request sought confidential work-product information, EFCA objected to the
20 production of that information. As worded, the request seeks "analysis performed by or for EFCA
21 ... that ... in any way analyze the impact of APS's rate proposal ..." which would implicate *all*
22 analyses performed by EFCA or its member companies at the direction or request of EFCA's
23 counsel.

24 Without waiving any objections, and to eliminate further contest on this issue, EFCA has
25 no documents responsive to this Request, whether confidential or not; however, EFCA's experts
26 may conduct studies or analysis responsive to this Request as part of their testimony in this case.
27 If that occurs, the information will be provided with their opinions.

28

¹⁴ Ariz.R.Civ.Proc 26(b)(3)

1 In the meet-and-confer conference between the Company and EFCA, the Company never
2 requested a privilege log or requested that any withheld information be described; if it had made
3 these requests, EFCA would have clarified that no studies or analysis responsive to this request
4 presently exist.

5 The Company's request for studies and analysis should be denied.

6 **III. APS RAISES A HOST OF TANGENTIAL AND IRRELEVANT ISSUES**

7 The Company apparently chose its Motion to Compel as a vehicle to raise a host of
8 tangential and irrelevant issues to this case. For the sake of brevity, EFCA will address each
9 allegation briefly.

10 Interestingly, while complaining about EFCA propounding discovery requests on the
11 Company,¹⁵ the Company neglects to point out that EFCA is the only intervenor to which it has
12 propounded discovery requests. In fact, in all its dealings in numerous matters throughout the
13 United States, EFCA has rarely faced a utility behaving in this manner (*i.e.*, attempting to turn the
14 utility's rate case into an examination and intimidation of EFCA's members). Notably, APS took
15 the opposite position when arguing that Ms. Lockwood should not be deposed. There, APS
16 chastised EFCA because it had not served *enough* written discovery.¹⁶ APS is Arizona's largest,
17 most lucrative utility. It has all the leverage in litigating this case. It files the rate application. It
18 has all the facts. Intervenors must discover facts to put on their case in a compressed timeframe.
19 Intervenors pay their own way. Utilities usually recover all of their rate case expenses. There is
20 simply no comparison of the burden that discovery places on a utility versus an intervenor. And it
21 is essential to note *that this is APS's rate case*, not EFCA's. APS has the burden of proof, not
22 EFCA. Therefore, it is impossible that any of these inquiries are relevant to the ultimate finding in
23 this case, which is setting just and reasonable rates for APS and its ratepayers.

24 The Company makes unsupported allegations of discovery abuses, yet provides no proof
25 of abuse and, more importantly, no proof of a good faith attempt to work through these issues
26 before filing this motion. As set forth above, most of the disputes raised in the Company's Motion
27 were not actually in dispute. EFCA will not waive the work product and other protections afforded

28 ¹⁵ APS's Motion to Compel, page 3, line 4.

¹⁶ APS's Motion for Protective Order, page 2, filed October 6, 2016.

1 it at law, but EFCA has demonstrated a willingness to address oversights and omissions in a
2 forthright and professional manner.

3 For the foregoing reasons, EFCA requests that APS's Motion to Compel be denied in its
4 entirety.

5 Respectfully submitted this 19th day of December, 2016.

6
7 /s/ Court S. Rich
8 Court S. Rich
9 Rose Law Group pc
Attorney for Energy Freedom Coalition of America

10 **Original and 13 copies filed on**
11 **the 19th day of December, 2016 with:**

12 Docket Control
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15 *I hereby certify that I have this day served a copy of the foregoing document on all parties of*
16 *record in this proceeding by regular or electronic mail to:*

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EXHIBIT A

**ENERGY FREEDOM COALITION OF AMERICA'S
SUPPLEMENTAL RESPONSE TO ARIZONA PUBLIC SERVICE COMPANY'S
FIRST SET OF DATA REQUESTS
APS DOCKET E-01345A-16-0036; E-01345A-16-0123
NOVEMBER 18, 2016**

Questions about EFCA

APS 1.1 1.1(a) Describe EFCA's business, including its purpose, its source of funding, and what EFCA does or seeks to accomplish in relation to the interests of its members and managers.

Objection. EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Arizona Public Service's (the "Company") property and setting the Company's reasonable rate of return. EFCA's purpose, funding, or goals are not relevant to the value of the Company's property or its reasonable rate of return. These issues are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects to this request to the extent it requests funding information on First Amendment grounds. EFCA's advocacy is First Amendment protected speech and the right to fund that speech anonymously is protected. Funding protected speech is also protected under the First Amendment. Forcing EFCA to reveal its funding sources has an unconstitutional chilling effect on free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

Response: Without waiving any objections and as set forth in its Application to Intervene filed in this docket, EFCA advocates for the proliferation of distributed energy resources ("DERs") around the country.

Supplemental Response:

Without waiving and subject to the forgoing objections, EFCA is funded by its members.

1.1(b) Provide a list of EFCA's members and members of its Board of Directors or any other governing board or decision-making body.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set a just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members, directors, or board, or decision makers are not relevant to the value of the Company's property or its reasonable rate of return. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA objects to this request on First Amendment grounds. EFCA exists to promote the adoption of DERs and its advocacy is First Amendment protected

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speech. Participating in this proceeding is protected speech, and forcing it to reveal the identities of its leaders would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

Without waiving any objections, EFCA is not a corporation and has no board of directors. The phrase "other decision making body" is undefined and susceptible to multiple interpretations.

Response: Without waiving any objections: EFCA is a limited liability company formed in Delaware with the following Members as previously set forth in its Application to Intervene: Zep Solar LLC; Ecological Energy Systems; 1 Sun Solar Electric LLC; Go Solar LLC; Silveo LLC; and Solar City Corporation.

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APS 1.2 1.2(a) Does EFCA sell any products or provide any services?

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding any products or services EFCA provides far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA objects to the phrase "provide any services" as undefined and susceptible to multiple interpretations. It is unclear whether this Request is inquiring about services to consumers or EFCA members.

Response: Without waiving any objections, EFCA advocates for the proliferation of DERs which could be viewed as a service.

1.2(b) If so, describe the product or services it sells, identify to whom and state the annual revenue from the sales.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding any products or services EFCA provides far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

See the Response to request 1.2(a) above.

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APS 1.3 1.3(a) Does any member of EFCA provide services to or for EFCA, such as accounting, tax, legal, physical resources (office space), and/or consulting?

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all the services EFCA receives far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on the basis of confidentiality (ER 1.6) and attorney-client privilege. All legal services it receives from a licensed attorney are confidential and privileged, and EFCA does not consent to disclose what lawyers it uses for advice.

EFCA further objects on the basis of accountant-client privilege. A client's relationship with his CPA is confidential and privileged.

EFCA further objects to the extent this request seeks work-product, which is confidential under Arizona Rule of Civil Procedure 26(b). To the extent EFCA used a consultant, that consulting expert's opinions and work product are confidential. Like their opinions, the identity of consulting experts is confidential and protected from discovery.¹ "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."² Because this data request could call for the identities of confidential consulting experts, EFCA objects.

1.3(b) If so, describe with particularity the service being provided and any fees being charged to EFCA.

Objection: EFCA objects to this request because it is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and

¹ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997).

² *In re Ins. Placement Services (Bermuda) Ltd.*, 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App. July 14, 2011); *accord Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir.1980) (finding that involuntary "[d]isclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel."); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122 (S.D.N.Y. 2014) ("Rule 26 protects the identities of retained consulting experts as privileged unless they are designated to testify and, thus, the Subpoena must be quashed").

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setting the Company's reasonable rate of return. A universal demand for information regarding all the services EFCA receives far exceeds the scope of any information that will assist the commission in its important task. They are nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on the basis of attorney-client privilege. All legal services it receives from a licensed attorney are confidential (ER 1.6) and privileged, and EFCA does not consent to disclose what lawyers it uses for advice.

EFCA further objects on the basis of accountant-client privilege. A client's relationship with his CPA is confidential and privileged. EFCA will not provide any information about its relationship with its accountant.

EFCA further objects to the extent this request seeks work-product, which is confidential under Arizona Rule of Civil Procedure 26(b). To the extent EFCA used a consultant, that consulting expert's opinions and work product are confidential. Like their opinions, the identity of consulting experts is confidential and protected from discovery.³ "The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable."⁴ Because this data request calls for the identities of confidential consulting experts, EFCA objects.

³ *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 474 (Tex. 1997).

⁴ *In re Ins. Placement Services (Bermuda) Ltd.*, 03-11-00374-CV, 2011 WL 2768825, at *2 (Tex. App. July 14, 2011); accord *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir.1980) (finding that involuntary "[d]isclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel."); *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 122 (S.D.N.Y. 2014) ("Rule 26 protects the identities of retained consulting experts as privileged unless they are designated to testify and, thus, the Subpoena must be quashed").

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APS 1.4 1.4(a) Identify the senior level executives of EFCA.

Objection: EFCA objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all of EFCA's senior executives is far beyond the scope of that hearing. This is nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers. Further, it is calculated only to harass EFCA's members.

EFCA further objects on First Amendment grounds. EFCA's advocacy is First Amendment protected speech. Participating in EFCA is protected speech, and forcing it to reveal the identities of its leaders would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

1.4(b) Identify who or what owns EFCA and in what percentage.

Objection: EFCA objects to this request as vague and ambiguous because it fails to define the term "own." To the extent "own" refers to a membership interest, EFCA already disclosed that information above.

The rights of EFCA's members do not translate into percentages, and EFCA cannot answer this question.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's equity structure is not relevant to that task.

1.4(c) Which of EFCA's members currently conduct or have conducted business in Arizona?

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies' business information. None of the member companies are parties to this proceeding.

EFCA further objects because APS already has this information in its possession. Any company installing rooftop solar in APS territory would submit

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interconnection applications to APS. APS therefore has access to that information without forcing EFCA to conduct original research.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members' business in Arizona is not relevant to determining reasonable rates.

Without waiving any objections, EFCA has posed this question to its Members in the past and can answer that Members Ecological Energy Systems, 1 Sun Solar LLC, and Go Solar LLC, do not do business in Arizona. The other Members have either not responded or may do business in Arizona.

1.4(d) For those EFCA members that currently conduct business in Arizona, how long have they done so?

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies' business information. None of the member companies are parties to this proceeding.

EFCA objects to this request as overbroad and unduly burdensome. In order for EFCA to respond to this request it would be necessary to conduct research, perform an investigation, and obtain discovery from its member companies. A party only has to provide information in its possession or under its control, none of the requested information is in EFCA's possession or control.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members' business in Arizona is not relevant to determining reasonable rates.

1.4(e) If any member no longer conducts business in Arizona, identify when they stopped doing so.

Objection: EFCA has no information with which it can respond to this Request. This request seeks information not within the possession or control of EFCA. EFCA is a Delaware limited liability company. It has an existence separate and distinct from its member companies. EFCA does not possess any of its member companies'

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business, revenue, or strategy information. None of the member companies are parties to this proceeding.

EFCA objects to this request as overbroad and unduly burdensome. In order for EFCA to respond to this request it would be necessary to conduct research, perform an investigation, and obtain discovery from its member companies. A party only has to provide information in its possession or under its control, none of the requested information is in EFCA's possession or control.

EFCA also objects because this request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. EFCA's members' business in Arizona is not relevant to determining reasonable rates.

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APS 1.5 1.5(a) How many employees does EFCA have?

Objection: EFCA objects because this discovery request is not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. A universal demand for information regarding all of EFCA's employees is far beyond the scope of that hearing. This is nothing but a distraction from the proceeding's goal of setting just and reasonable rates for Arizona consumers.

EFCA further objects on First Amendment grounds. EFCA exists to promote the adoption of DERs, and its advocacy is First Amendment protected speech. Participating in EFCA is protected speech, and forcing it to reveal the identities of its employees would chill free speech. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958).

This request is formulated to harass EFCA and has no legitimate basis.

1.5(b) How many of those employees are also employees of one or more EFCA members? If any, which member or members?

Objection: EFCA objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. The potential outside employment of any EFCA personnel is not relevant to this proceeding.

This request is formulated to harass EFCA and has no legitimate basis.

1.5(c) For those EFCA employees that are also employees of an EFCA member, fully describe in detail how costs are allocated between members for those employees.

Objection: EFCA objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence. In this rate case, the Commission's task is to set just and reasonable rates. This includes valuing the Company's property and setting the Company's reasonable rate of return. Any agreements among EFCA's members are not relevant to that task. This request is formulated to harass EFCA and has no legitimate basis.

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APS 1.6 Provide all communications and documents exchanged between EFCA and SolarCity regarding APS's rate case.

Objection: EFCA objects to this discovery request in that any responsive documents would be confidential communications between EFCA and its Members. The communications requested among the Members of EFCA, including SolarCity would constitute confidential, litigation work product and is thus not relevant evidence or reasonably calculated to lead to the discovery of admissible evidence.

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APS 1.7 Please provide any and all studies or analysis performed by or for EFCA, or in EFCA's possession, that attempt to predict or in any way analyze the impact of APS's rate proposal (or any part thereof) on:

- a. The ability of EFCA's member companies to sell or lease systems in APS's service territory;
- b. The future rate of adoption of DG in APS's service territory;
- c. The future economics of DG to the customer in APS's service territory; or
- d. The future economics of DG to the solar provider in APS's service territory.

Objection: EFCA objects to the extent that this request calls for the production of confidential work product. This response will be supplemented when and if EFCA becomes aware of any non-confidential responsive documentation.

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APS 1.8 Please provide all work papers associated with any witness sponsored by EFCA contemporaneous with the filing of such witness' testimony.

Response: EFCA will provide along with the filing of its witness testimony.